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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5161

KURK KENDALL JOHNSON, Petitioner,

vs.

STATE OF OKLAHOMA, Respondent.

REPLY BRIEF TO ARGUMENTS FIRST RAISED IN RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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KURK KENDALL JOHNSON, Petitioner,

vs.

STATE OF OKLAHOMA, Respondent.

QUESTION PRESENTED

Whether it violates the United States Constitution's Fifth Amendment prohibition against former jeopardy for the State of Oklahoma to prosecute petitioner for second degree murder under Title 21, § 701.2 (now repealed), of the Oklahoma Statutes, where it has formerly prosecuted him for kidnapping for purposes of extortion under Title 21, § 745, of the Oklahoma Statutes, when the matter arose out of the same transaction.

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Pursuant to this Court's Rule 22.5 petitioner hereby respectfully submits a Reply Brief addressed to arguments first raised in the Brief in opposition filed herein by Respondent, State of Oklahoma.

Petitioner is hereinafter referred to as "Johnson", and Respondent is hereinafter referred to "Oklahoma".

JURISDICTION

Oklahoma has not questioned this Court's jurisdiction or the timely filing of this petition by Johnson.

QUESTION PRESENTED

Whether it violates the United States Constitution's Fifth Amendment prohibition against former jeopardy for the State of Oklahoma to prosecute petitioner for second degree murder under Title 21, § 701.2 (now repealed), of the Oklahoma Statutes, where it has formerly prosecuted him for kidnapping for purposes of extortion under Title 21, § 745, of the Oklahoma Statutes, when the matter arose out of the same transaction.

REPLY TO OKLAHOMA'S ARGUMENT

I. Oklahoma's first points are:

(A) By failing to invoke the proper appelate procedure to adequately protect his double jeopardy guarantees;

(B) By failing to apply for a change of venue for the purpose of joining the informations for trial; and

(C) By moving for and receiving a continuance of his murder trial until his kidnapping trial has been completed.

(A) For the very first time ever in these proceedings the State of Oklahoma, in its opposition brief, urges that Johnson waived his right to assert double jeopardy. Oklahoma takes said position notwithstanding:

That Johnson objected to the First Degree Murder charge before the trial court, filed a writ before the Oklahoma Court of Criminal Appeals and successfully obtained a writ of certiorari before this Court, reversing the lower Courts;

That upon Oklahoma seeking to prosecute Johnson upon Second Degree Murder, he consistently prior to and through the trial proceedings urged and preserved the double jeopardy question; and

That petitioner urged the question of double jeopardy again before the Oklahoma Court of Criminal Appeals when he took a timely appeal from the judgment and sentence in the trial court.

Oklahoma claims that the Oklahoma Court of Criminal Appeals held that Johnson had "waived" any claim of double jeopardy. This assumption is apparently based upon that court's dicta and citation of Jeffers vs. United States, 432 U. S. 137, 53 L.Ed. 2d 168, 97 S.Ct. 2207 (1977), and totally ignores the well established Oklahoma law that the constitutional guaranty against double jeopardy is not waived, where a defendant before judgment interposes a proper plea thereto. See Mowels vs. Oklahoma, 52 Okla.Cr. 191, 11 P.2d 206 (1932); and Jackson vs. Oklahoma, 11 Okla.Cr. 523, 148 Pac. 1058 (1915). Further, the Oklahoma Court of Criminal Appeals in Ex parte Zeligson, 47 Okla.Cr. 45, 47, 287 Pac. 731, 732 (1930), clearly set forth Oklahoma's procedural law regarding the question. Same is, in part, as follows:

> "This court is committed to the doctrine that former jeopardy and former conviction, to be made available as a plea to bar a further prosecution, must be presented in the trial court, the overruling of such plea being error reviewable by direct attack by an appeal and that the judgment of conviction after jeopardy is a voidable judgment as distinguished from a void judgment; that former jeopardy may be waived by a defendant, and is waived, when not interposed in the trial court or raised in the course of the trial." [Emphasis added.]

It is abundantly clear that Johnson followed the aforesaid doctrine and there was not a "waiver" of his former jeopardy plea.

(B) Regardless of the foregoing, this Court in Young vs. Ragen, 337 U.S. 235, 93 L.Ed. 133, 69 S.Ct. 1073 (1949),

states, "It is not simply a question of state procedure when a state closes the door to any consideration of a claim of denial of a federal right." Whether a federal constitutional right is waived is a matter for ultimate decision by this Court. In Parker vs. Illinois, 333 U.S. 571, 574, 92 L.Ed. 886, 68 S.Ct. 708 (1948) (reh.den. 334 U.S. 813, 92 L.Ed. 1744, 68 S.Ct.1014), this Court stated:

> "When federal rights are involved it is, of course, for this Court finally to determine whether the failure to follow the procedure designed by a State for their protection constitutes a waiver of them."

Here, the criminal procedural doctrine as to pleas of former jeopardy were followed and neither the Oklahoma Court of Criminal Appeals nor the respondent Oklahoma should be allowed to change the rules "after the ball game."

In furtherance of its argument of "waiver", Oklahoma argues that Johnson should have sought a change of venue for the purposes of joining the informations for trial. It cites as authority Title 22, Section 438 of the Oklahoma Statutes. However, Title 22, Section 445 of the Oklahoma Statutes places the burden upon the prosecuting attorney or the State's judiciary and reads:

> "In all criminal cases pending in any county where the venue properly lies in another county, the court may, upon motion of the county attorney, or upon its own motion, transfer such cause to the county of proper venue; such transfer, in all respects, shall be made in the manner provided by law."

The venue of the kidnapping charge could have clearly been transferred to Osage County by Oklahoma. See 22 Okla. Stat. § 126.

The Court is respectfully reminded that Johnson is and has been at all times an indigent. Under this Court's requirements in Gideon vs. Wainwright, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963) Oklahoma was required to appoint counsel. It did so. The Public Defender in the Tulsa County case and one of the co-counsel in the present petition, for the Osage County case.

There were two separate and distinct defense counsel, through no fault of Johnson, which, of course, results in little coordination. Johnson should not be penalized for Oklahoma's counsel-appointment system especially where the Tulsa County judiciary and either prosecuting attorney could have remedied same as above pointed out. Since the foregoing was not done, it seems apparent that the prosecutors wanted two chances at Johnson, hoping for convictions on both which would run consecutive rather than concurrent.

(C) Oklahoma relies heavily on the Jeffers Case, supra, which Johnson submits is clearly distinguishable. This Court in that case was faced with the issue of whether Jeffers had waived a claim of former jeopardy by successfully opposing a government motion to consolidate indictments for two separate offenses arising out of the same transaction. As hereinbefore pointed out, Johnson never opposed consolidation because Oklahoma decided not to combine the venues.

Oklahoma contends further that Johnson waived his double jeopardy plea when he asked for a continuance. The first continuance in the case was during the preliminary and obtained by Oklahoma. Johnson's motion for continuance was filed on the 3rd day of September, 1975, the same day that Johnson's kidnapping trial commenced in Tulsa County. Obviously, the delay resulting from Johnson's motion for continuance is inconsequential. The homicide trial would have clearly come after the kidnapping trial and Johnson submits it could not matter whether that was two weeks thereafter as scheduled or three years after the kidnapping trial as was the fact.

This point has no validity. Johnson submits that Oklahoma cannot be serious for if it was it would have made this contention the first time Johnson came before this Court.

With or without the continuance, the double jeopardy question would still exist.

II. Oklahoma's second points are:

> No substantial federal question exists for (1) "the same transaction test" does not apply, and (2) application of "the same transaction test" would not yield a different result.

Space does not permit Johnson's reiterating his position relating to the proper constitutional standard being the "same transaction" test, the necessity of one constitutional standard relating thereto and the intent of the founding fathers. Suffice it to say here that not only does the "same evidence test" depart from the founders' intent, there are infinite substantive offenses that could arise from a single criminal episode or "transaction", thereby decreasing "double jeopardy protection." See Johnson vs. Oklahoma, Okla.Cr., 611 P.2d 1137 (1980).

Oklahoma contends that the "same transaction" test, if applicable, would not apply. It relies on the exceptions to said "same transaction" test suggested by Justice Brennan in his dissenting opinion in Ashe vs. Swenson, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970). Same are:

(1) A separate prosecution should be allowed when a crime is not completed or discovered, despite diligence on the part of the State, until after the commencement of a prosecution for other crimes arising from the same transaction; and

(2) If no single court has jurisdiction of all the alledged crimes.

The victim was kidnapped on the 30th day of March, 1975, and was, according to the prosecution's evidence, killed the next day. Johnson was arrested in the evening that second day. The police alledged that they knew from tapes of phone calls that Johnson was keeping the victim in the trunk of his car. When the arrest was made, the victim was not there. The

kidnapping charges were filed the third day. On the fourth day, the victim's body was found.

Granted, the kidnapping complaint had been filed but jeopardy had not attached. See Okla. Const., Art. 2, § 21; Ridenour vs. Oklahoma, Okla.Cr., 231 P.2d 395 (1951); Cornell vs. Oklahoma, 91 Okla.Cr. 175, 217 P.2d 528 (1950) and McAllister vs. Oklahoma, 97 Okla.Cr. 167, 260 P.2d 454 (1953). Oklahoma could have easily transferred the kidnapping charge to Osage County. See 22 Okla. Stat. 126, 445. Johnson would respectfully suggest that exception (1) mentioned above could only be a valid exception where jeopardy attached.

In its brief, Oklahoma strains crediability by arguing that the Tulsa Police, when the kidnapping charges were filed, did not know the victim was dead. The victim, whom they knew had been removed from the trunk, was not in Johnson's apartment nor had he returned home. Their actions clearly show that the police knew the victim was dead.. It was not necessary to locate the victim's body to file a murder charge. See 40 C.J.S., Homicide, § 201, page 1102. Under Title 22, Section 124 of the Oklahoma Statutes, Johnson submits that the murder charge could have been prosecuted in Tulsa County, or in the alternative, removed to Osage County pursuant to Section 445 of said Title, if already filed in Tulsa County.

The prosecutors blundered in both Osage and Tulsa Counties either by carelessness or by design. Perhaps, Oklahoma was proper in originally filing the kidnapping charge, but after the body was found Oklahoma should have filed First Degree Murder by Kidnapping for Extortation in Osage County, which it did but later had to reduce to Second Degree Murder because it had already convicted Johnson of Kidnapping, and then dismiss the Tulsa County kidnapping charges. Under Oklahoma's theory, Oklahoma

could have charged Second Degree Murder in Osage County and moved the kidnapping charge to Osage County, having one trial thereby. By doing what it did, Oklahoma had two clear "shots" at Johnson in separate trials. Same is "double jeopardy."

Perhaps, both Tulsa County and Osage County had jurisdiction of both offenses. Certainly, the District Court of Osage County had jurisdiction of both charges had Oklahoma elected to lay venue there. See 22 Okla. Stat. §§ 438,445.

CONCLUSION: That Johnson has fully replied to Oklahoma's brief in opposition to Johnson's petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney for petitioner, do hereby certify that I served a true and correct copy of the foregoing reply brief to arguments first raised in respondent's brief in opposition to petitioner's petition for writ of certiorari upon the respondent at the office of the Honorable Jan Eric Cartwright, Attorney General of the State of Oklahoma, by and through Assistant Attorney General, Timothy S. Frets, 112 State Capitol Building, Oklahoma City, Oklahoma 73105, by depositing same in the mail at the Post Office in Pawhuska, Oklahoma, on the 24th day of October, 1980, with first clase postage thereon fully prepaid.

Billy Leon Haskett

Attachment